

ORIGINAL

IN THE SUPREME COURT OF OHIO

**APPEAL FROM THE COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY, OHIO**

BRUCE HOUDEK,

Plaintiff-Appellee,

v.

THYSSENKRUPP MATERIALS, N.A.,
INC., ET AL.

Defendants-Appellants.

Case No. 2011-1076

[Discretionary Appeal from Eighth
District Court of Appeals Case No.
95399]

**BRIEF OF AMICUS OHIO AFL-CIO
IN SUPPORT OF APPELLEE BRUCE HOUDEK**

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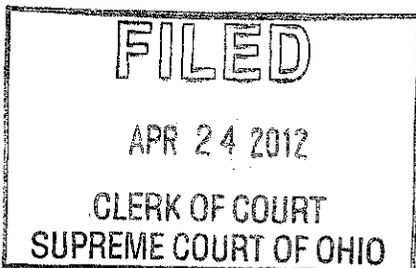
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I. STATEMENT OF THE CASE AND FACTS

Plaintiff Bruce Houdek filed an intentional tort suit against his employer, defendant ThyssenKrupp Materials, after he suffered a catastrophic injury at work. A sideloader driven full speed by a co-worker struck Mr. Houdek. According to the sideloader operator:

I was going full speed and . . . all I remember is just that at the last second before impact, I saw Bruce pop up . . . I just saw like a flash of a helmet, and I jammed on the brakes . . . but at that point it was just too late.

Deposition of sideloader operator George Krajacic, p. 94.

The sideloader struck Mr. Houdek in an aisle where the employer had instructed Mr. Houdek to place inventory tags as light duty work. Mr. Houdek could not perform his normal work because he had hurt his back at work the previous Friday. [Deposition of Bruce Houdek, p. 28-29; Deposition of shop supervisor Jared Kuhn, p. 70.]

The driver of the sideloader which struck Mr. Houdek described the aisle as “shadowy, poorly lit.” [Deposition of sideloader operator George Krajacic, p. 80.] The employer’s “inadequate lighting contributed to this injury.” [Affidavit of workplace safety expert and workplace engineer Frank Burg, para. 13, subpara. a, d.]

The employer used the sideloader to fill orders from the aisle because it was too narrow for a forklift. [Krajacic depo. p. 26.] The aisle was only six to eight inches wider than the sideloader. [Deposition of plant manager Joe Matras, p. 47.]

Because of the sideloader’s design, the operator had obstructed visibility on the left. [Krajacic depo. p. 51.] According to workplace safety expert and workplace engineer Frank Burg, the significant blind spots faced by the sideloader operator made it

“mandatory that the side loader be provided with methods to assure aisles are clear of personnel.” [Burg affidavit para. 13, subpara. c.] However, the employer did not provide any method for the operator to ensure that no one was in the aisle. The sideloader had only a manual horn, it did not have any automatic warning signal. The sideloader also lacked flashing or external lights. [Krajacic depo. p. 45; Matras depo. p. 62.]

The employer did not have any written safety policy to protect employees on the floor from the sideloader. The employer only had an unwritten policy to tell the sideloader operator that someone was down the aisle. [Matras depo. p. 119-120, 123-124.]

This unwritten policy was the employer’s only method of protecting employees on the floor even though, as shop supervisor Kuhn indicated, he knew that sideloader operators should know of pedestrians in the aisles for the safety of the person in the aisle. The shop supervisor indicated that an employee in the aisle would face a dangerous situation if the sideloader operator did not know of their presence because they could be hit by the sideloader. [Kuhn depo. p. 161-162.]

The employer trained Mr. Krajacic, the sideloader operator, by showing him a 20-30 minute video which dealt mainly with towmotor safety, not sideloaders. [Krajacic depo. p. 17-18, 117]. According to the shop supervisor, the only instructions the employer’s training video gave about methods to avoid hitting pedestrians with the sideloader was “[b]asically always watching where you’re going and watching even what

was around you for something that could happen.” [Kuhn depo. p. 8, 33-34.] Expert engineer Burg indicated that the employer had not

properly trained [its employees] to never operate the side loader with visibility obscured by the mast in conditions of poor lighting unless they are absolutely certain the path of travel in [sic] clear and unobstructed.

Burg affidavit para. 13 subpara. f (bracketed material added).

The employer did not close aisles when an employee worked down the aisle. [Krajacic depo. p. 72.] The employer did not place any sign, gate or other warning on the aisle to notify Mr. Krajacic that Mr. Houdek was in the aisle. [Krajacic depo. p. 102.] Although Mr. Houdek had told Mr. Krajacic that he would be working down that aisle, Mr. Krajacic forgot. [Krajacic depo. p. 85-86, 108.]

As Bruce Houdek tagged material with inventory tags, he heard a humming coming down the aisle. He looked up and saw the sideloader “right in front of me.” [Houdek depo. p. 36-37.]

As Mr. Krajacic drove the sideloader at full speed down the aisle, going to the left (the side with obstructed visibility), he saw Mr. Houdek “pop up.” [Krajacic depo. p. 94, 100.] Because of the narrow design of the aisle, Mr. Houdek had “nowhere to go but up”, so he started climbing to try to save himself. [Houdek depo. p. 37.] However, he did not have time. Mr. Krajacic jammed on the brakes, but could not stop and the sideloader pinned Mr. Houdek against a scissor lift. [Houdek depo. p. 37; Krajacic depo. p. 94.]

Before the accident happened, Mr. Krajacic had asked his supervisor if he should rearrange his orders when someone told him they were going to be down a specific aisle. His supervisor told him not to do so because “they’ll get out of your way.” [Krajacic

depo. p. 125.] Unfortunately, Mr. Houdek could not get out of the way of the sideloader.

As the Court of Appeals stated:

Perhaps, a twenty-year-old with the speed, agility, and strength of a Force Recon Marine, Army Ranger, Navy Seal, or Olympic gymnast could have effected an escape from the oncoming sideloader. [Mr.] Houdek, however, as a middle-aged man whose mobility was limited by his prior physical injury . . . could not.

Houdek v. Thyssenkrupp Materials N.A., Inc., 8th
Dist. No. 95399, 2011-Ohio-1694, ¶31.

Mr. Houdek woke up three days later, in the hospital. He stayed in the hospital for six months while recovering from his severe injuries. [Houdek depo. p. 38-39.]

According to Mr. Krajacic, Mr. Matras, the plant manager, said after the accident that he knew something like that accident could happen but did not do anything about it. [Krajacic depo p. 138.] Expert safety engineer Burg opined that the employer

had to know that there was a *significant possibility that workers could be injured* when working in a narrow poorly illuminated storage area where side loaders are utilized with no procedure to prevent contact between the equipment and the workers

* * *

A blindsided side loader moving into a confined, unprotected or not barricaded area with no spotters, no one checking and not even motion/backup alarm, no horn sounding, and an operator not properly trained to make certain the aisle is clear of pedestrians, creates at [*sic*] situation that *must be considered imminent danger*.

Burg affidavit para. 13 subpara. g, 1 (emphasis added).

The Court of Appeals reversed the trial court's grant of summary judgment for the employer, recognizing "the fingerprints of [the employer's] specific directives were

all over [Mr.] Houdek's workplace injuries." *Houdek* ¶32. The employer appealed to this court.

II. ARGUMENT

Proposition of Law:

An employee can establish an R.C. 2745.01(A) intentional tort by showing that the employer acted with either intent or deliberate intent. An employee can prove the employer's intent by direct or circumstantial evidence.

A. An employee can establish an R.C. 2745.01(A) intentional tort by showing that the employer acted with either intent or deliberate intent.

1. The R.C. 2745.01(A) standard created by the legislature permits an employee to establish an intentional tort by showing either intent or deliberate intent.

The employer and its amicus claim that Mr. Houdek can only satisfy the R.C. 2745.01 intentional tort standard by showing that the employer acted with "specific intent." But the statute does not contain the term specific intent. R.C. 2745.01(A) provides that Mr. Houdek can establish an intentional tort by showing that the employer acted either (1) "with the intent to injure" or (2) "with the belief that the injury was substantially certain to occur." R.C. 2745.01(B) defines "substantially certain" to mean "that an employer acts with deliberate intent to cause an employee to suffer an injury."

R.C. 2745.01 does not require proof of specific intent. Had the legislature intended to require proof of specific intent to satisfy the R.C. 2745.01(A) intent requirement it would have done so – as demonstrated by the legislature's definition of substantially certain to mean deliberate intent.

The intentional tort statute, by its language, does not require Mr. Houdek to establish that the employer acted with specific intent. Nor does the statute require Mr. Houdek to establish that the employer acted with deliberate intent.

R.C. 2745.01(A) provides two alternative standards for an intentional tort: (1) intent and (2) substantially certain (defined as deliberate intent). The legislature did not define intent to mean deliberate intent. R.C. 2745.01(B) demonstrates that intent and deliberate intent have different meanings. Had the legislature believed that intent meant the same thing as deliberate intent, R.C. 2745.01(B) would state that “substantially certain” means “intent.”

To require Mr. Houdek to show deliberate intent, or specific intent, would qualify the legislature’s use of the word intent in R.C. 2745.01(A). The Court should not limit the legislature’s use of the term intent in R.C. 2745.01(A) by adding either the word “deliberate” or “specific” because the Court “may not restrict, constrict, qualify, narrow, enlarge, or abridge the General Assembly’s wording.” *State, ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, ___ Ohio St.3d ___, 2012-Ohio-1484, ¶18.

Adopting the employer’s construction of the statute would eliminate the term intent from R.C. 2745.01(A) and would ignore what the legislature provided. Such a construction would render the legislature’s provision that an intentional tort can be established by “intent” or “substantially certain (deliberate intent)” meaningless. Adding a qualification to the legislature’s use of intent in R.C. 2745.01(A) would also render the legislature’s use of the word deliberate in R.C. 2745.01(B) meaningless.

The employer bases its argument for a specific intent standard on *Kaminski v. Metal and Wire Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, and *Stetter v. R.G. Corman Derailment Services, L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092. However, *Kaminski* and *Stetter* were concerned with constitutional challenges to R.C. 2745.01 and the substantially certain definition.

Kaminski and *Stetter* did not address the issues before the Court in the present case. Neither *Kaminski* nor *Stetter* considered the effect of the legislature's use of an alternative definition in R.C. 2745.01(A) ("intent" or "deliberate intent") or what the R.C. 2745.01(A) intent requirement means.

The Court's use of the term "specific intent" as an equivalent of "deliberate intent" when considering constitutional challenges to the legislature's redefinition of substantially certain does not justify ignoring the language of the statute which states that intent may establish an intentional tort.

This Court cannot adopt the employer's argument and require evidence of "specific intent" to establish an R.C. 2745.01 intentional tort unless it rewrites the statute and ignores the actual language used by the legislature.

2. Finding that Mr. Houdek cannot prove an R.C. 2745.01(A) intentional tort would demonstrate that R.C. 2745.01(A) is an illusory remedy.

The employer placed Mr. Houdek in imminent danger by requiring him to work in a poorly lit, confined area where an improperly trained driver operated a sideloader at high speed.¹ As the Court of Appeals recognized, if the facts of the present case "do not present genuine issues of material fact as to the existence of an employer intentional tort, then none shall." *Houdek v. Thyssenkrupp Materials N.A., Inc.*, 8th Dist. No. 95399, 2011-Ohio-1694, ¶38.

An interpretation of R.C. 2745.01(A) which bars Mr. Houdek from even

¹ Because this case arose from a decision granting the employer's motion for summary judgment, the Court must construe the evidence in Mr. Houdek's favor. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

presenting his intentional tort claim to a jury would effectively mean that an employee could only establish an intentional tort through R.C. 2745.01(C), the provision relating to removal of a safety guard and misrepresentation of a substance. Had the legislature intended such a result, it could have written the statute to read that an intentional tort only occurs when the employer removes a safety guard or misrepresents a substance.

The Court should not add requirements to R.C. 2745.01(A) which would make it impossible for an employee like Mr. Houdek to have the opportunity to establish an intentional tort under the R.C. 2745.01(A) intent standard because no part of a statute

“should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.” (Citation omitted.)

Carna ¶ 19.

A standard which cannot be met is no remedy. The Court should not render R.C. 2745.01(A) an illusory remedy.

Interpreting the statute to include requirements so severe that even the facts of the present case are not sufficient to go to a jury would conflict with this Court’s decision in *Kaminski*. *Kaminski* found no need to address arguments that R.C. 2745.01 violated Ohio Constitution Art. I, Sec. 16, by eliminating an employee’s right to recovery for an intentional tort. The Court found no need to address those arguments because R.C. 2745.01 “constrains rather than abolishes an employee's cause of action for an employer intentional tort.” *Kaminski* at ¶98.

A decision by this Court that R.C. 2745.01(A) bars Mr. Houdek’s right to have a jury consider his intentional tort suit, would demonstrate that R.C. 2745.01(A)

improperly abolished, rather than constrained, the employee intentional tort claim.

B. An employee can prove the employer's intent by direct or circumstantial evidence.

Proof of an employment intentional tort “may be made by direct or circumstantial evidence.” *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998). This Court has recognized the “fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts.” *State v. Johnson*, 56 Ohio St.2d 35, 39, 381 N.E.2d 637 (1978).

Unfortunately, the natural, reasonable and probable consequences of the employer's acts – requiring Mr. Houdek to work in a poorly lit, narrow aisle in which another, improperly-trained employee operated a sideloader at high speed with obstructed vision – was that the sideloader would strike Mr. Houdek and injure him.

Nothing in R.C. 2745.01 addresses how a worker must prove an employer's intent, or changes the standard that an employer intends the consequences of its act. Therefore, the employer must be held to have intended the natural consequences of its acts which placed Mr. Houdek in imminent danger.

The employer claims that a subjective standard should apply to an R.C. 2745.01(A) intentional tort. However, as the Court of Appeals recognized, “[s]uch an interpretation would place a premium on willful ignorance or deceit.” *Houdek* ¶45.

The employer's actions demonstrate its intent. The defendant in *Johnson* admitted his acts but denied he “specifically intended to kill” the victim. *Johnson* at 38. Similarly, the employer in this case denies it intended to injure Mr. Houdek by its acts. The statute in *Johnson* required “specific intention to cause a certain result.” *Johnson* at

38. The Court in *Johnson* found the proof of intent sufficient to uphold a murder conviction even though the defendant denied intent. Similarly, the proof of intent in the present case would permit an intentional tort finding against the employer even though the employer denies intent.

As *Johnson* recognized when determining whether a defendant acted with requisite intent to be found guilty of murder, intent “can never be proved by the direct testimony of a third person, and it need not be. It must be gathered from the surrounding facts and circumstances.” *Johnson* at 38, quoting *State v. Huffman*, 131 Ohio St. 27, 1 N.E.2d 313 (1936) at syl. 4. The surrounding facts and circumstances of the present case demonstrate the employer’s intent and would permit a jury to find that the employer’s actions, which placed Mr. Houdek in imminent danger of injury, violated R.C. 2745.01(A).

III. CONCLUSION

As the Court of Appeals recognized, the employer's directives were responsible for Mr. Houdek's injuries. *Houdek* ¶ 32. The employer required Mr. Houdek to work in a poorly lit aisle where an improperly trained sideloader operator ran the sideloader at high speed, with obstructed vision, with no warnings (audible or visual) for pedestrians and without providing a barricade or warning to the operator that there was a pedestrian in the aisle. The employer did nothing to protect Mr. Houdek and placed him in "imminent danger" even though the employer "had to know that there was a significant possibility that workers could be injured." [Burg affidavit para. 13 subpara. g, l.]

Is there any meaning to the legislature's provision that an employee like Mr. Houdek can prove intentional tort by either "intent" or "substantial certainty (direct intent)"? The employer's argument that Mr. Houdek must demonstrate specific intent to establish an intentional tort would render the language of R.C. 2745.01(A) meaningless. The legislature did not provide in the statute that intent means direct intent or specific intent.

Does R.C. 2745.01(A) permit an employee to sue an employer for an intentional tort? If Mr. Houdek's case does not provide sufficient facts for a jury to consider his R.C. 2745.01(A) claim, no case will provide sufficient facts. If this Court interprets R.C. 2745.01(A) to deny Mr. Houdek the right to pursue his intentional tort case, it will deny him "his right to fair recompense" for his injury. *Houdek* ¶1. Such a result would render

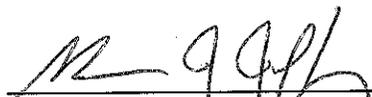
R.C. 2745.01(A) an illusory remedy. The Court should not interpret R.C. 2745.01(A) to require an employee to satisfy a standard which cannot be met because under such a standard

Ohio employees who are sent in harm's way and conduct themselves in accordance with the specific directives of their employers, if injured, may be discarded as if they were broken machinery.

Houdek ¶39

To accept the employer's argument, and find that Mr. Houdek cannot present his case to the jury, would mean that it is impossible for an employee to pursue an R.C. 2745.01(A) intentional tort. It would mean that, as was argued in *Kaminski*, the statute provides an illusory remedy. Because this Court found that statutory remedy not illusory in *Kaminski*, the Court should affirm the Court of Appeals decision.

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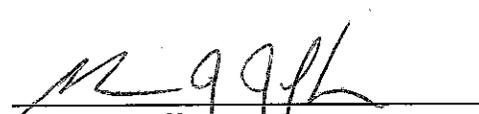
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APPENDIX

Appendix A: R.C. 2745.01

§ 2745.01. Liability of employer for intentional tort - intent to injure required - exceptions

(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

(B) As used in this section, “substantially certain” means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

Appendix B: Ohio Constitution Art. I, Sec. 16

§ 16. Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.